

ESTATE OF JAMES ALLENDER.

JUNE 21, 1910.—Ordered to be printed.

Mr. KEAN, from the Committee on Claims, submitted the following

REPORT.

[To accompany H. R. 4738.]

The Committee on Claims, to whom was referred the bill (H. R. 4738) for the relief of the estate of James Allender, deceased, having considered the same, reports it favorably and recommends that it do pass.

The Committee adopts as its report the report (Report No. 544) of the Committee on Claims of the House of Representatives, hereto appended.

[House Report No. 544, Sixty-first Congress, second session.]

The Committee on Claims, to whom was referred the bill (H. R. 4738) for the relief of the estate of James Allender, deceased, having considered the same, report thereon with a recommendation that it do pass.

In 1872 James Allender was the owner of a grist mill and dam situate on the Monongahela River, just below Morgantown, W. Va., which had been in existence from 1806. (See report of N. Goff, jr., United States district attorney for district of West Virginia, under date of July 31, 1876, to Hon. Alfonso Taft, Attorney-General.)

The report of United States Attorney Goff, now United States circuit court judge for the fourth judicial circuit, which was made under the direction of the Attorney-General, upon the request of the Secretary of War, Hon. J. D. Cameron, by letter dated June 26, 1876, sets forth very fully the fact that the mill and dam were authorized by general acts of the assembly of Virginia, passed December 21, 1792, (see vol. 1, Revised Code of Virginia, of 1803, p. 197), also act of February 3, 1806 (see Hennings Virginia Stat. L., New Series, vol. 3, p. 272), and adds his opinion, as follows:

I am of the opinion that the requirements of these acts were complied with, so far as the Allender milldam is concerned.

Another act was passed January 22, 1813, entitled "An act requiring owners of dams across the Monongahela River to erect locks therein," and giving jurisdiction to the court of the county wherein the dam was situated to enforce its provisions. Under this act proceedings were begun at November term, 1816, by which commissioners were appointed "to examine the manner in which the lock (which Jacob Kerns had constructed) is built and report to the December term next whether according to law or not."

At the December term, 1816, the commissioners above named reported that they had "viewed the lock that Jacob Kerns has made

through his milldam on the Monongahela River near Morgantown and find that the same is sufficient for boats to pass through, it being 16 feet wide and 87 feet long and sufficiently deep," and no further action was taken by the court.

By a regular chain of title the franchise or right to erect the dam and build the mill, and the real estate necessary for the successful operating of the gristmill and the use of the water power (first vested in Henry Dering and Michael Kerns, jr., in 1806), passed to James Allender, who was the owner and operated the mill in 1870, and until it was rendered valueless, and the water power and dam destroyed in 1873 by the United States in building the lock and dam on said river, known as "No. 9," in making said river navigable above the West Virginia line. During the whole period from 1806 till the United States took possession of this property, "the dam has existed, been used, kept in repair, and recognized as a lawful structure," and that "the structure called the 'Allender milldam' was, in my opinion, a legally erected dam, and so continued to the time of its destruction." (See opinion of District Attorney Goff.)

In 1873 the building of the locks and dams by the United States for improving the navigation of the Monongahela River was in active operation under the direct supervision of William West, civil engineer, who was acting under the direction of Bvt. Col. William E. Merrill, United States engineer, and it became apparent that the Allender milldam would have to be removed in order to open the channel of the stream and make the river navigable, and thereby destroy the water power used in operating this mill and damage or destroy the mill property. In a letter from Brig. Gen. A. A. Humphreys, Chief of Engineers, under date of December 23, 1875, to Hon. Charles J. Faulkner, then Member of the House from the Second West Virginia District (original on file with the House Committee on Claims), he says:

This matter was brought to my attention—

Allender's claim for damages, etc.—

by Colonel Merrill, the officer in charge of the work, who, in order to ascertain the probable amount of damages that would be done Mr. Allender's property, agreed to a proposition to submit the question to arbitrators to be selected by Mr. Allender and himself.

The arbitrators were chosen—two by Allender, two by William Weston, the agent acting for and on behalf of the Government of the United States, and under the direction of Brevet Colonel Merrill, and a fifth person selected by the four—and, after being duly sworn, personally examined the premises and duly considered the question of damages submitted to them, and unanimously agreed and signed and returned their award to said Weston, in which they agreed, decided, and awarded that—

the said Allender is entitled to and shall receive from the Government of the United States for the water privilege and franchise pertaining to his said mill, in full of his claim for damages to said property by reason of the improvement of the river by the Government of the United States by locks and dams, the sum of twenty-three hundred and fifty dollars. (See official copy of award in the files in this case.)

This award was made on the 26th day of April, 1873, as appears by a copy certified from the War Department. This award was acquiesced in by both parties, the dam taken possession of and removed by the United States, and navigation ultimately completed from Pittsburg to

Fairmont at a total cost of \$5,000,000. Allender later sold the mill building and real estate, moved to another part of the State, and died some years ago without receiving any compensation for his property, which had been a source of revenue to him and his family for many years.

A number of bills have been introduced for the payment of this claim, and one passed the House (H. R. 650, 44th Cong., 1st sess.), and on May 15, 1876, was read twice in the Senate and referred to the Committee on Claims, and on June 1, 1876, it was reported with amendments. June 26, 1876, the Secretary of War submitted to the chairman of the Senate Committee on Commerce a letter from the Chief of Engineers relative to this claim, with copies of communications from Maj. W. E. Merrill, Corps of Engineers, in conflict with the views previously entertained upon the validity of said claim, and same date (June 26, 1876) the Secretary of War brought the legal questions involved to the attention of the Attorney-General, requesting that the district attorney at Wheeling be directed to supply, if possible, the desired information.

This information was received August 4, 1876, and is contained in the report from Hon. N. Goff, United States attorney for the district of West Virginia, hereinbefore quoted, but no further action seems to have been taken by the Senate on H. R. 650. The dam (No. 9) was finished in December, 1879, so that the Government has had the use of the Allender property for over thirty years, and nearly thirty-seven years have passed since the award was made and from that date the property was no longer usable as a grist mill and the damages accrued.

In 1875, April 10, Hon. J. M. Hagans, then a Member of Congress from the district in which the Allender dam was located, asked Gen. A. A. Humphreys, Chief of Engineers, U. S. Army, "whether the damages awarded to James Allender for injury to the site of his mill property on the Monongahela River can be paid out of the appropriation for the improvement of the river," to which General Humphreys replied—

that in the opinion of this department the acts making the appropriations do not authorize the settlement of claims of this kind, and that they can not be paid until an act of Congress is obtained specially providing for their payment.

Under date of May 2, 1908, Hon. B. F. Harper, Auditor for the War Department, in answer to a letter of inquiry from Mr. Sturgiss, Member of the House for the Second West Virginia District, wrote—

relative to the claim of one James Allender for damages sustained by reason of improvement on the Monongahela River, * * * I am of opinion that I have no authority of law to allow this claim. If I otherwise had jurisdiction, it would further appear that there is no appropriation now available out of which this claim could be paid.

For many years before the civil war the Monongahela Navigation Company, a corporation chartered by the State of Pennsylvania and authorized to improve the navigation and collect tolls upon and by reason of locks and dams to be built by it, had taken possession of the Monongahela River and made it navigable by a series of locks and dams from its junction at Pittsburgh with the Allegheny River up to the mouth of Jacobs Creek, within less than half a dozen miles of the Pennsylvania and West Virginia state line. After the National Government began the construction of Lock No. 9, just above the state

line, it was discovered that one or two other locks were necessary to connect the navigable waters that would be created by Lock and Dam No. 9 and others above it with the artificial navigation created and controlled by the Pennsylvania corporation, and the Government acquired title to the works and the franchises of that corporation by condemnation proceeding by virtue of an act of Congress (29 Stat., 1896), which did not exclude consideration of the franchise or right to take tolls from all persons and crafts passing through the locks by virtue of the act of the Pennsylvania legislature creating the franchise.

A previous act of Congress (Aug. 11, 1888, 25 Stat., 400-411, chap. 860) authorizing the taking of a part of this property by condemnation proceedings, expressly excluding the consideration of the franchise as an element of value and limiting the commissioners to the consideration of the value of the physical property, was declared unconstitutional by the Supreme Court of the United States (vol. 148, pp. 312 et seq.), upon the theory that so long as the National Government did not exercise its right under the Constitution to regulate commerce between the States by improving the navigation of interstate streams the States might exercise that right and grant to others the right to lock and dam streams for navigation, subject to the exercise of its constitutional rights by the United States whenever it chose to take jurisdiction over any stream that could be made an instrument or aid to interstate commerce. Condemnation proceedings were instituted under the later act and the value of both physical property and the franchise created by the State ascertained and paid for by the National Government, amounting to several million dollars, and the property acquired and made a part of the system of locks and dams that now makes this system navigable for over 125 miles.

Virginia granted the right to the original owners of the Allender mill site to build a dam to create the water power to operate a grist mill, upon which tolls were to be taken for the grinding done, and upon the strength of that grant, at a time when the right of the State to so do was unquestioned, and the superior right of the nation dormant and unexercised, the dam was built and the mill erected and began work. The right of the National Government to take jurisdiction over interstate streams and to make them navigable, and to condemn, take, and destroy private property and improvements thereon made by virtue of grants by the States has been too long exercised and approved and upheld by the courts to be now questioned, but equally clear is the right of the citizen and corporation that have acquired rights and privileges from the State (which rights and privileges are as truly property as the physical structures that may have been erected in pursuance of such grants) to be compensated for such taking under that other provision that guarantees life, liberty, and property, and that the latter shall not be taken without just compensation and by due process of law.

The only other question that remains to be considered is what is a just compensation in the Allender case and has it been ascertained by law.

A court of arbitration is a domestic tribunal, one created by the voluntary agreement of the parties, and if its award is untainted by fraud or undue influence and the parties to the agreement have authority and right to settle the matters in controversy by creating such a court its award is morally binding upon the parties, and

between private persons can be enforced by appropriate proceedings in the courts.

The court of arbitration was mutually agreed upon by a written instrument signed by Allender and by William Weston, a duly authorized agent and representative of Colonel Merrill, the engineering officer in charge of the work of building the locks and dams. The arbitrators were duly sworn to determine the matters in controversy which were set out in the agreement to submit these matters to arbitration, and after making a personal inspection and examination of the premises, and doubtless hearing such proof as either of the parties chose to offer (though this latter does not clearly appear), all five of the arbitrators united in ascertaining that a just compensation to be paid to Mr. Allender by the Government of the United States for the—

water privileges and franchise pertaining to his said mill property, the sum of two thousand three hundred and fifty dollars, in full of his claim for damages to said property by reason of the improvement of the river by the Government of the United States by locks and dams.

In the agreement to arbitrate it was agreed that the decision of the arbitrators as to the question of damages so submitted—

should be binding and conclusive on Allender, provided the same shall be accepted and approved by the Government of the United States in a reasonable time.

While the record nowhere discloses that there was any written acceptance and approval of the award by the Government of the United States, yet it clearly appears that the property was taken possession of and used by the War Department, and the water power and dam destroyed, and the work of improving the navigation of the river, so far as that part affecting the Allender Mill was concerned, was finished in 1879 (see letter of Brig. Gen. A. Mackenzie, Chief of Engineers, U. S. Army, Mar. 23, 1908), which dam, No. 9, occasioned the injury complained of by Allender and ascertained by the award aforesaid. Thus it clearly appears that a just compensation was ascertained by a proper tribunal at \$2,350.

In the further prosecution of the improvement of the navigation of the upper Monongahela between Morgantown and Fairmont, the lands and buildings of persons living along the banks of the river were overflowed and damaged by the backwater created by the construction of sundry of the locks and dams. The claimants for compensation filed their petitions in the Court of Claims, and the findings of that court as to the amount of compensation which the landowners were entitled to receive were embodied in the urgent deficiency appropriation bill, which has passed the House and the Senate at the present session of Congress and doubtless will receive the signature of the President.

This claim appeals most strongly to the sense of equity and justice, and is founded upon the ownership of property and investment of money, based upon a general act of the legislative body of Virginia, enacted for the purpose of encouraging at that early date, before the beginning of the last century, the creation of water power and the erection of mills for the accommodation of the general public. The dam was a lawful structure, in the opinion of District Attorney Goff, was never at any time considered or attempted to be declared a nuisance, and was in pursuance of a wise public policy to encourage the settlement of the country at that early date.

The claimant has been knocking at the doors of Congress from the date of the introduction of the first bill for payment of these damages,

until his death in September, 1899, and through his personal representatives and heirs, has still been seeking the payment of this just claim.

It was not merely a case of taking or destroying property of value, but property whose daily revenues, derived from an honest, useful public industry, constituted the support and sustenance of the owner and of his family.

On January 11, 1910, the chairman of the Committee on Claims of the House addressed a communication to the Secretary of War, inclosing a copy of this bill, and asking the Secretary—

to look over the inclosed bill and let me know if you recommend the payment of the amount mentioned in this bill, or any other sum, as justly due.

Again on January 27, 1910, the chairman addressed another letter to the Secretary of War, stating—

will you please give me an opinion as to the merits of H. R. 4738, and also let me know what amount, if any, you recommend to be paid to the claimant.

In reply to the foregoing the present Chief of Engineers, Brig. Gen. W. L. Marshall, U. S. Army, under date of January 31, 1910, in a letter addressed to the Secretary of War, says:

Receipt, by reference, is acknowledged of letters of the 11th and 27th instant from the chairman of the Committee on Claims of the House of Representatives, inclosing copy of H. R. 4738, Sixty-first Congress, first session. * * * In view of the fact that the United States, by its proper representative, submitted the question of damages to arbitration, and nothing appearing to show any fraud or unfairness in the award, the claim for the amount mentioned in the bill is believed to be just, and it is recommended that the bill be passed.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, January 31, 1910.

SIR: 1. Receipt, by reference, is acknowledged of letters of the 11th and 27th instant from the chairman of the Committee on Claims of the House of Representatives, inclosing a copy of H. R. 4738, Sixty-first Congress, first session, and requesting to be advised "if you recommend payment of the amount mentioned in the bill or any other sum as justly due."

2. It appears from the records in this office that the improvements to the Monongahela River caused damages to the Allender mill property, and that a board of arbitrators was chosen to determine and award the amount of such damages. A copy of the agreement of the representative of the United States and James Allender and of the finding of the board is sent herewith (G. R. 1046/5 of 1873).

3. It further appears that an act for the relief of Mr. Allender, by the payment of \$2,350, was passed by the House of Representatives May 5, 1876 (H. R. 650, 44th Cong., 1st sess.). On May 15, 1876, the bill was read twice in the Senate and referred to the Committee on Claims, and on June 1, 1876, it was reported with amendments, the nature of which is not of record in this office, nor does it appear that payment of the amount awarded has ever been made.

4. In view of the fact that the United States, by its proper representative, submitted the question of damages to arbitration, and nothing appearing to show any fraud or unfairness in the award, the claim for the amount mentioned in the bill is believed to be just, and it is recommended that the bill be passed.

Very respectfully,

W. L. MARSHALL,
Chief of Engineers, U. S. Army.

The SECRETARY OF WAR.

I, James Allender, being the owner and sole proprietor of the mill property on the east side of the Monongahela River, below and near Morgantown, known as "Allender's mill," and the Government of the United States being about to extend the-

present system of slack-water improvement upon said river to Morgantown by locks and dams, I hereby agree to submit the question of my claim for damages for the injury or destruction of my said property and the rights, privileges, and franchises pertaining thereto to the arbitrament and award of five persons, two of whom to be selected by myself, two others by William Weston, the agent acting for and on behalf of the Government of the United States and under the direction of Brevet Col. Wm. E. Merrill, and the fifth one by the four persons so selected, who shall act under oath, and whose decision as to the question of damages so submitted shall be binding and conclusive on me, provided the same shall be accepted and approved by the Government of the United States in a reasonable time.

Given under my hand this 26th day of April, 1873.

JAMES ALLENDER.

In pursuance of the foregoing agreement James Allender selected William N. Jarrett and Samuel Sears. On behalf of the Government of the United States William Weston selected George M. Hagans and Ralph L. Berkshire, and the four others selected David H. Chadwick.

JAMES ALLENDER.
WM. WESTON.
WM. N. JARRETT.
S. SEARS.
GEO. M. HAGANS.
R. L. BERKSHIRE.

We, the undersigned arbitrators chosen in pursuance of the foregoing submission and agreement, after having first been duly sworn and after having personally examined the premises and duly considered the question of damages submitted to us, do agree, decide, and award that the said Allender is entitled to and shall receive from the Government of the United States for the water privileges and franchise pertaining to his said mill property the sum of \$2,350 in full of his claim for damages to said property by reason of the improvement of the river by the Government of the United States by locks and dams, and the said Allender is to have the privilege of using said water privilege until the same may be destroyed by said improvement. Given under our hands and seals this 26th day of April, 1873.

WM. N. JARRETT. [SEAL.]
S. SEARS. [SEAL.]
GEO. M. HAGANS. [SEAL.]
D. H. CHADWICK. [SEAL.]
R. L. BERKSHIRE. [SEAL.]

DEPARTMENT OF JUSTICE,
Washington, August 2, 1876.

SIR: Referring to your letter of the 26th of June last, addressed to this department, in which information is desired concerning the legal existence of Allender's milldam at Hoards Rocks, Monongahela River, I have the honor to transmit herewith a copy of a letter of the 31st ultimo, addressed to me by the United States attorney for the district of West Virginia, in which he gives a full statement of the title in Allender to the property upon which the dam referred to is situated.

Very respectfully, your obedient servant,

ALPHONSO TAFT,
Attorney-General.

Hon. J. D. CAMERON,
Secretary of War.

DISTRICT OF WEST VIRGINIA,
UNITED STATES ATTORNEY'S OFFICE,
Clarksburg, July 31, 1876.

SIR: Responding to your communication of 28th ultimo, relative to the legal existence of the "Allender milldam" at Hoards Rocks, Monongahela River, I have the honor to report that—

At the August term, 1805, of the county court of Monongalia County, Va., the following order was entered on the record:

"On motion of Henry Dering, by his attorney, it is ordered that a writ of ad quod damnum be awarded, directed to the sheriff of this county, to summon and impanel a jury to condemn 1 acre of ground, the property of said Dering, on the Monongahela River, for the purpose of building a water gristmill, to meet on said land the 19th day of the present month."

At the December term of said court, 1805, this order was entered on the records of said court: "A writ of ad quod damnum for Henry Dering, with the inquisition thereto annexed, was produced in court and ordered to be recorded."

For some cause this inquisition was not recorded, the most careful examination of the records and papers of the office failing to discover it. It has been lost or mislaid. There is no record of it. But on the 13th of July, 1806, said Henry Dering and one Michael Kern, jr., entered into a bipartite deed whereby they agreed upon certain stipulations binding the said Kern to erect a gristmill at the place condemned above, said Dering to have an equal share of the proceeds of the mill when erected, in consideration of which Dering conveyed to said Kern one-half the mill site, mill, etc.

It is apparent that the mill and milldam were authorized to be constructed by proceedings under the general law and not by special act of the legislature. The proceedings were taken under the provisions of the act of the assembly of Virginia, passed December 21, 1792, which can be found in volume 1, Revised Code of Virginia of 1803, page 197, entitled "An act to reduce into one the several acts concerning mills, milldams, and other obstructions of water courses." The provisions of an act passed February 3, 1806, see Henning's Statutes at Large, new series, third volume, page 272, entitled "An act authorizing milldams to be built across the Monongaliae River," also, apply to the dam in question. This act requires how dams shall be built, height, power, slopes, etc. I am of the opinion that the requirements of these acts were complied with, so far as the Allender milldam is concerned.

Another act was passed January 22, 1813, entitled "An act requiring owners of dams across the Monongahela River to erect locks therein." This act requires "that the owners or occupiers of all dams now erected across the Monongahela River, and such as may hereafter be erected, shall be obliged to erect sufficient locks through the same adjoining such mill, at least 16 feet wide, sufficiently deep and long that boats may pass through with convenience," etc. Commissioners to be appointed by the court to ascertain whether or not the proprietors of dams had complied with the terms of this act. It is also provided by said act that if the proprietor of any such dam fail or refuse to make such lock within eighteen months from and after the passage of said act, and keep the same in constant repair, it shall be lawful for the court of the county wherein such dam is located—on application of any person—to direct commissioners, to be appointed for that purpose, to view the same, and report the situation thereof, and if it appears that said dams, locks, etc., are not kept as required by said act, said court is required to direct the sheriff of the county to cause said dams to be pulled down at the cost of the proprietor.

Under this act the following proceedings were had at November term, 1816, of the county court of Monongahela County, viz:

"Ordered, That Mathew Gay, Rawley Evans, and Francis Billingsly be appointed to examine the manner in which the lock is built by Jacob Kerns (this Jacob Kerns is the son of Michael Kerns, whose interest in the mill and dam had passed to Jacob) on his mill dam, and report to the December term next whether according to law or not."

At December term, 1816, the following record was made:

"In conformity to an order of the court, we the undersigned have viewed the lock that Jacob Kerns has made through his milldam on the Monongahela River near Morgantown, and find that the same is sufficient for boats to pass through, it being 19 feet wide and 87 feet long, and sufficiently deep. The bed of the river immediately above and below is of a tolerable depth, but there is no crane or windlass, as the law directs, nor do we see that the same is necessary."

"Given under our hands, this 9th day of December, 1816.

"MATHEW GAY,
"RAWLEY EVANS,
"FRANCIS BILLINGSLY."

On January 18, 1822, Jacob Kerns conveyed his interest in the mill property to John Thorn, and on same day Henry Dering's heirs conveyed their interest to said Thorn, thus vesting their entire title in him.

The property has passed through several owners regularly into the hands of the present proprietor, Mr. Allender. During all this time, from 1806 down to the

present, the dam has existed, been used, kept in repair, and recognized as a lawful structure.

In conclusion, I beg to state that the result of a careful examination brings me to the conclusion that the dam, now called the "Allender milldam," was constructed under the general law and not under any special legislative permission, as Colonel Merrill seems to think. So far as I can see, and as the records of the courts disclose, the provisions of the law regulating milldams have been substantially complied with. Had they not been complied with, the only way to declare them illegal (the dam, slopes, etc.) was as provided by the code. It (the dam) was never proceeded against as a nuisance, never abated, or declared to be illegal. The structure called the "Allender milldam" was, therefore, in my opinion, a legally erected dam, and so continued to the time of its destruction.

I am, most respectfully, your obedient servant,

N. GOFF, Jr.,
United States Attorney.

HON. ALPHONSO TAFT,
Attorney-General, Washington.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, March 23, 1908.

MY DEAR MR. STURGISS: 1. Your letter of the 14th instant to the Secretary of War, requesting information relative to the claim of the late James Allender, for destruction of milling property on the Monongahela River by reason of construction of government works for improvement of the river, having been referred to this office, I have the honor to inform you that an act for the relief of Mr. Allender by the payment of \$2,350 was passed by the House of Representatives May 5, 1876 (H. R. 650, 44th Cong., 1st sess.). On May 15, 1876, the bill was read twice in the Senate and referred to the Committee on Claims, and June 1, 1876, it was reported with amendments.

2. June 26, 1876, the Secretary of War submitted to the chairman of the Senate Committee on Commerce a letter from the Chief of Engineers relative to this claim, with copies of communications from Maj. W. E. Merrill, Corps of Engineers, in conflict with the views previously entertained upon the validity of said claim, and on the same date, June 26, the secretary brought the legal questions involved to the attention of the Attorney-General of the United States, requesting that the district attorney at Wheeling be directed to supply, if possible, the desired information. This information was received August 4, 1876. Copy of letter from the Attorney-General and of report of the district attorney herewith.

3. On February 17, 1882, the Chief of Engineers received a letter from Hon. John Blair Hoge, M. C., stating that as the last clause of the bill contained a proviso that no portion of the damages should be paid until completion of the improvement, he desired a statement that the dam which occasioned the injury had actually been completed. On February 28, 1882, Mr. Hoge was informed that the dam was finished in December, 1879.

4. This office possesses no further information bearing upon the case.

Very truly, yours,

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

HON. GEO. C. STURGISS,
United States House of Representatives.

STATE OF WEST VIRGINIA, *Taylor County, to wit:*

I, Charles R. Durbin, do solemnly swear that I was personally well acquainted with James Allender, deceased, who resided in Taylor County, W. Va., and died about the 1st day of September, 1899, testate; that his will was duly probated in the clerk's office of the county court of said Taylor County on the 18th day of September, 1899; that I was duly appointed and qualified as sole executor of said will before the said court on the 18th day of September, 1899.

I was not advised at the time of my appointment that said Allender had a pending claim against the United States Government for the destruction of the mill and dam

and franchise and rights owned by said Allender on the Monongahela River near Morgantown, in Monongalia County, said State, and destroyed by the locking and damming said river by the United States Government; that I first learned of the actual existence of said claim or demand due the estate of said James Allender from the United States Government about the — day of September, 1900, and that no part of said claim or demand has ever been received by me or paid to me by any department of the United States Government, and I verily believe that no part thereof was ever paid to said Allender in his lifetime nor to any of his heirs since his death. My residence and post-office address is Grafton, Taylor County, W. Va.

CHAS. R. DURBIN.

Taken, sworn to, and subscribed before me this 8th day of April, 1908.

In witness whereof I have hereunto signed my name and affixed my official seal.

[SEAL.]

WILL R. D. DENT,
Notary Public.

STATE OF WEST VIRGINIA, *Taylor County, to wit:*

I, Mary C. Madera, do solemnly swear that I am a daughter of James Allender, deceased, who died in Taylor County, State aforesaid, testate, on the 1st day of September, 1899; that said Allender's will was duly probated before the county court of said county on the 18th day of September, 1899, and Charles R. Durbin, of said county, was duly appointed and qualified as sole executor of said will before said court on the 18th day of September, 1899.

I know that my father, James Allender, had a pending claim against the United States Government for the destruction of his mill, dam, and franchise and rights situated near Morgantown on the Monongahela River, in Monongalia County, State aforesaid, by the locking and damming said river by the United States Government; I further know that no part of said claim was ever paid by any department of the said United States Government to said James Allender in his lifetime, nor to any of his heirs since his death, and that the same remains due and wholly unpaid. My residence and post-office address is Grafton, Taylor County, W. Va.

MARY C. MADERA.

Taken, sworn to, and subscribed before me this 11th day of April, 1908. In witness whereof I have hereunto signed my name and affixed my official seal.

[SEAL.]

HERBERT W. DENT,
Notary Public.

